IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1 of 2001

in

SPECIAL CIVIL APPLICATION No 12181 of 2000

with

Civil Application No.34 of 2001

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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Versus

UNION OF INDIA

Appearance:

MR PRASHANT G DESAI for the Appellant

Mr.S.B. Vakil, Senior Counsel, with

MR MANISH R BHATT for Respondent Nos. 1 and 2.

Mr.K.S. Nanavati, of NANAVATI ASSOCIATES,

for Respondent No. 3

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE P.B.MAJMUDAR

Date of decision: 07/02/2001

C.A.V. JUDGEMENT

(Per : MR.JUSTICE P.B.MAJMUDAR)

1. By this Letters Patent Appeal, the appellant has challenged the order passed by the learned single Judge, by which the Special Civil Application filed by the present appellant has been dismissed.

2. The facts relating to the controversy between the parties are as under :-

The appellant herein was the original petitioner of Special Civil Application No.12181 of 2000. It is the say of the appellant that it is a Limited Company, duly incorporated under the provisions of the Companies Act, 1956. Respondent No.2, Institute for Plasma Research, is an institute under the Department of Atomic Energy, Government of India. Respondent No.2 carries on experimental and theoretical research in plasma physics with emphasis on the Physics of magnetically confined hot plasmas and non-linear plasma phenomena.

It is the case of the appellant that it is one of the pioneers in India in the field of Air-conditioning and Refrigeration for the last 50 years and it is having extensive experience of air-conditioning and refrigeration on turn-key basis. It is also the say of the appellant that it is having a most modern factory in Thane in the State of Maharashtra and the appellant also manufactures the entire range of air-conditioning and refrigeration equipments, such as reciprocating compressors, condensers, chillers, cooling coils, Centrifugal Liquid Chillers, vapour absorption heat pumps, packaged type A.C. units for capacity ranging from 5 T.R. to 1000 T.R. plant. As per the averment in the petition, the appellant is having full-fledged Branch Office and service station at Ahmedabad with well trained Engineers and Technicians and the appellant undertakes air-conditioning and refrigeration projects right from the stage of designing and planning at their end till execution of the Project at job site, including testing and commissioning of the system. The appellant is also having service set up at Surat, Silvasa, Baroda, and

Ankleshwar to look after the business interest of their customers in the State of Gujarat and adjoining Union Territory.

3. In paragraph 5 of the petition, the appellant has pointed out the major jobs which they have undertaken which are either executed or under execution. They read as under :-

Sr.No.	Particulars	Contract Value (Rs. in crore)
01.	Gujarat High Court 3 x 430 TR Centrifugal Water Chilling Machines.	4.5 crores.
02.	Indoor Stadium for Surat Municipal Corporation 2 x 270 T.R. Centrifugal water chilling machine	3.1 crores.
03.	Garden Silk Mills, Surat 2 x 500 TR Centrifugal Water Chilling Machines	2.5 crores.
04.	Larsen & Toubro Ltd., Powai, Mumbai (for I.P.C.L., Dahej) 8 x 1000 TR Steam Fired Vapour Absorption Heat Pumps).	6.5 crores.
05.	Space Application Centre, Ahmedabad, 5 x 100 TR Screw Chillers	4.0 Crores.
06.	Gujarat Narmada Valley Fertilizers Co. Ltd. INFO Tower, Ahmedabad 2 x 200 TR Centrifugal Water Chilling Machine	2.3 crores.
07.	Air Port Authority of India, Ahmedabad Air Port 2 x 300 TR	1.95 crores.
08.	ISRO Air Conditioning CATR Facilities, Ahmedabad 3 x 85 TR Screw Chillers.	1.99 crores.

4. It is also the say of the appellant in the petition that it has done work for the Institute for Plasma Research, i.e. respondent No.2 herein, for

installing air-conditioning system for an amount of Rs.1.70 crores. Respondent No.2 herein invited tenders for the work of design manufacturing/fabrication, supply, installation, site testing and commissioning of SST-1 Water cooling system, etc., as per Tender Notice No.IPR/TN/PUR/020/99-2000 dated 13.12.1999. It is the say of the appellant that in the tender notice, it is mentioned that :-

> "... vendors fulfilling the conditions mentioned below and desirous of quoting against this tender notice can submit their written request to the Purchase Officer at the above address. Vendors must furnish documentary proof in respect of following information while making request for tender documents and drawings. If the Vendor fails to comply with all the conditions stipulated in (1) to (4) below, tender documents will not be issued to such vendors ...."

Last date for receipt of request with all the relevant documents asked for in the tender notice was 3.1.2000. The conditions mentioned in the tender notice were for pre-qualification of the tenderers, who intend to fill the tender as per the tender notice. About 6 parties submitted their offers to the respondent No.2. The appellant was issued the tender document and the said tender was for design manufacturing / fabrication, supply, installation, site testing and commissioning of SST-1 water cooling system, having an estimated cost of Rs.696 lacs. It is also the say of the appellant that the time of opening the tender was extended to 1.3.2000 and the time to submit tenders was also extended upto 1.3.2000. The appellant's representative was present at the time of opening of tender on 1.3.2000 and it was found that the appellant was the lowest bidder. The appellant quoted Rs.8,31,49,505/- and Respondent No.3 quoted Rs.8,87,00,786/-. According to the appellant, the aforesaid price was quoted by respondent No.3 after the discount given by respondent No.3 to the tune of Rs.20,28,453/-. It is, therefore, the say of the appellant that it was the lowest bidder and that, therefore, the price quoted by it was more favourable as compared to the price quoted by respondent No.3, as there was a difference of more than Rs.50,00,000/- between the prices quoted by the appellant and the respondent No.3. It is also the say of the appellant that it had given option for 3 x 310 TR Screw Chillers with remaining items

at Rs.7,96,99,505/-. It is also submitted that two options were called for in the tender and the appellant quoted for both the options, while none of the other tenderers has quoted both the options, including the respondent No.3. It is further the say of the appellant that after opening the tender, the appellant received a letter on 6.6.2000 from the respondent No.2, raising certain technical queries and the appellant subsequently replied the said queries. It is stated in the petition that as per the request of the respondent No.2, in their letter dated 1.9.2000, the Officer of the appellant-Company accompanied the Officers of the respondent NO.2 and showed certain work done by the appellant in Bombay in the month of September, 2000.

On 29.9.2000, about 4 to 5 representatives of various major sub-contractors have attended the meeting, along with the representatives of the appellant-Company, and the appellant had given all the details, as required by the respondent No.2. It is the say of the appellant that till September end and beginning of October, 2000, the appellant was made to believe that the offer of the appellant was the lowest and technically sound and, in that view of the matter, the appellant was awaiting Letter of Intent.

The appellant was, therefore, legitimately expecting issuance of contract in its favour. However, to the surprise of the appellant, it got an information on or about 21.11.2000 that the Letter of Intent is issued in favour of respondent No.3. On the aforesaid premises, it is the say of the appellant that it being the lowest tenderer, having offered Rs.55,00,000/- lesser than the offer of respondent No.3, coupled with the fact that the appellant is technically competent, having executed several works all over India, the work in question should have been awarded to it. It is also the say of the appellant that it is having well equipped service centre at Ahmedabad, while the respondent No.3 is not having any Service Centre at Ahmedabad and the appellant can provide better service to respondent No.2 at Ahmedabad as compared to respondent No.3.

It is the say of the appellant that the action of the respondent No.2 in not giving the Letter of Intent to the appellant was, therefore, arbitrary and without any authority. It is also the say of the appellant that there is a direction by the Central Vigilance Commission not to negotiate with any of the tenderers other than the lowest. It is the say of the appellant that its case was not considered objectively and it was not given proper

opportunity in the matter of showing the work of a similar nature, which was executed by the appellant and that favouritism was shown by the respondent No.2 in favour of respondent No.3, which has ultimately resulted in awarding the contract in favour of respondent No.3.

Under the above circumstances, the appellant filed the aforesaid Special Civil Application before this High Court, challenging the action of respondent No.2 in awarding the work in question to respondent No.3, ignoring the claim of the appellant for the same. It was, therefore, prayed that respondents 1 and 2 may be directed to cancel the Letter of Intent issued in favour of respondent No.3 and they may be directed to issue Letter of Intent in favour of the appellant and that the decision for awarding the contract to respondent No.3 may be quashed and set aside.

5. On behalf of respondents 1 and 2, the aforesaid petition was resisted by filing an affidavit-in-reply. It is pointed out in the affidavit-in-reply in paragraph 2 that the Institute for Plasma Research (IPR) is an internationally reputed premier scientific research organisation, established by the Department of Science and Technology. The objective of the Institute is promoting, guiding and conducting basic and applied research in the field of Plasma Physics and Thermonuclear fusion research with a long term goal of developing fusion as a source of energy. It is stated that research in plasma physics is of great strategic importance and is intended to lead the Nation towards the development of fusion as an alternative source of energy in order to meet the ever growing power needs. It is also stated that procedure for tender requirement of equipments and materials needed by a Scientific research organisation engaged in the research, which is frontline and strategic in nature, is different from the equipments and materials required by a non-scientific organisation due to technical complexity involved to achieve the desired scientific output. According to respondents 1 and 2, SST-1 is a unique experiment to come on line first in the whole global plasma physics experimental scenario. It is an extremely prestigious international Project undertaken by India to be completed in stipulated time to keep the Nation's scientific progress in the forefront of the international community. The successful operation of SST-1 in the first few years of the new century will put India in the front league of fusion research. A parallel programme of development of highly sophisticated technologies together with other institutions is highly crucial for the future of SST-1 programme. By delaying

the project due to non-availability of the desired water cooling system, IPR will not only mis-utilise the government fund, but also put the scientific reputation of the Nation at stake. It is stated that the total project cost is estimated at Rs.200/- crores. In the event of the vendor not being in a position to properly commission SST-1 water cooling system, it will not only result in delay in execution of the Rs.200/- crore project, but will also result in loss on account of idle man-days apart from loss of reputation of India in the scientific field internationally. It is pointed out that with a view to ensuring that the procurement is made in the right way, IPR has set up various Committees, like Need Aspect Committee, Junior Purchase Committee, Senior Purchase Committee (SPC) and Tender Award Committee (TAC), for scrutiny and finalisation of offers, consisting of Senior Scientists and Engineers and representatives of Accounts and Purchase. It is stated that involvement of senior Scientists and Engineers, including external Expert/s in the field, ensures selection of technically acceptable vendors for scientific materials and equipments. In the affidavit-in-reply, tendering procedure has also been explained.

It is also stated in the reply that there is a specific mention in the tender notice that vendors fulfilling the conditions mentioned in the tender can submit their request with documentary proof and that there is no mention in the tender notice that the vendors fulfilling the conditions are short-listed or pre-qualified. It is also stated in the reply that the tender document itself clearly states that IPR is not bound to accept the lowest bids and IPR shall be under no obligation to accept the lowest tender and that the purchaser reserves the right to accept any bid irrespective of whether it is the lowest or otherwise or to reject any or all bids without assigning any reasons therefor or to split the contract at the initial contract award stage or during the progress of the work due to unsatisfactory work or progress of any one contractor. All the decisions normally taken for development as well as for award of contract is by a High Power Committee, consisting of Experts of similar / various fields. In the present case, IPR had included Experts from Bhabha Atomic Research Centre, Department of Atomic Energy, Government of India (Mr.P.B. Kulkarni, Head - Technical Services Division), who is having vast experience in similar systems, Mr.N.R.K. Moorthy, an Engineer of Nuclear Power Corporation of India Limited, a Government of India undertaking under DAE, who is also having vast

experience in similar systems, and Dr.M.B. Jain, retired Head of Mechanical Engineering, Department of L.D. College of Engineering. In addition to these external Experts, the TAC consisted of Senior Scientists of the Institute. The TAC, in its first meeting, concluded that it should go in for Centrifugal Chillers, running on R-134a Refrigerant due to its technical superiority.

It is the further say in the affidavit-in-reply that since the appellant's bid was commercially lowest, TAC decided to call them for techno-commercial discussions on 29th September, 2000. TAC also authorised a team (consisting of 6 TAC members - 3 representatives from IPR and 3 external experts) to visit and evaluate the installations of the appellant. However, in spite of repeated requests, the appellant failed to show any installation with process cooling equipment similar to what IPR was looking for. They could show only three installations exclusively meant for Comfort Air Conditioning. Accordingly, the reply says, the appellant failed to show their own capability in the area of process cooling equipments to convince the TAC about their technical competence.

6. In the reply, respondent No.2 has also dealt with the salient features of the equipment, in detail, in paragraph 13 of the reply. Ultimately, on the basis of the recommendation of the Committee, the work in question was awarded to the respondent No.3. It is the say of the respondent No.2, therefore, that there is no substance in any of the averments made in the petition.

7. Respondent No.3 also resisted the claim of the appellant by filing affidavit-in-reply, which is at page 83 of the compilation.

8. The learned single Judge, by his order dated 26th December, 2000, dismissed the said Special Civil Application. It was found by the learned single Judge that it is not proper to look only at financial aspect as the respondent No.2 wanted the best person available to execute the work in question. It was also found by the learned single Judge that it is not open for the Court to substitute its decision for the decision of a party awarding the contract, particularly when such decision is taken on the recommendation of an Expert Committee. The learned single Judge also found that respondent No.2 bona fide believed that the respondent No.3 is technically qualified to execute the job and they will be able to get the work done efficiently through respondent No.3. In that view of the matter, ultimately, the aforesaid

Special Civil Application was dismissed by the learned single Judge, against which the appellant has filed this Letters Patent Appeal.

9. At the time of hearing of this Letters Patent Appeal, it was argued by Mr.Desai for the appellant that the decision making process is vitiated as the appellant was not given adequate opportunity to put his case before the Committee and to show similar type of work, which is carried out by the appellant, which has resulted in discrimination as against respondent No.3. Mr.Desai also pointed out that the appellant had quoted both the options and as against that, respondent No.3 and other tenderers had quoted only one option. Mr.Desai also submitted that except the appellant, no other tenderer has given second option and, therefore, the appellant was the only qualified person, who could have been considered for awarding the work in question. He also submitted that from the beginning, it was decided to award the work to respondent No.3 as it was known that only respondent No.3 was having experience for installing Centrifugal Chillers, running on R-134a refrigerant.

10. It is also the say of Mr.Desai that the Committee did not consider any other offer except the offer of respondent No.3 in its true perspective and, therefore, the action of the Committee is arbitrary and is liable to be set aside. According to the appellant, it has got very wide experience in similar type of work. It is further submitted that the decision to go for Centrifugal Chillers running on R-134a Refrigerant was not communicated to the appellant or to any other tenderer except to respondent No.3. In substance, it is the say of the appellant that the respondent No.2 has shown favouritism in favour of respondent No.3 by issuing Letter of Intent with deviation and no opportunity was given to the appellant or to any other tenderer at any point of time in respect of deviation. It is also the say of the petitioner that the respondent No.2 has deviated from the terms and conditions by giving excise duty exemption to the sister concerns of the respondent No.3, whereby advantage of Rs.50/- lacs is given to the respondent No.3 and its sister concerns. On technical aspect of the matter, it was submitted by the appellant that so far as R-134a Refrigerant is concerned, it is only a gas component and it has nothing to do with any design of the Project. The material design does not change because of the gas component and the gas component can be imported from outside by any party and, thereby, there is no need of expertise for doing the work of R-134a Refrigerant. It is also submitted that the

appellant is already doing the work of R-134a components at Vadodara. It is also submitted that in spite of the request, the respondent No.2 has not supplied the copy of the report or the copy of the tender submitted by respondent No.3 and that no such report exists and that respondent No.2 has suppressed material facts from the Court. It is submitted that till September, 2000, in all the correspondence, there was no specific mention about the Centrifugal Chiller Machines with R-134a Refrigerant and letter was written after the sites were visited on 21.9.2000 and that was only in order to favour respondent No.3 who is having more experience regarding Centrifugal Chillers running on R-134a Refrigerant. According to the appellant, therefore, the insistence upon R-134a gas component was only for favouring respondent No.3 and that the said gas component is not relevant for the installation of the project in question. It is also the say of the appellant that TAC has overlooked the drawbacks of respondent No.3. The appellant has also pointed out that in the Minutes of the first meeting of the T.A.C. held on 22.8.2000, the Committee has decided to opt for R-134a Refrigerant. It is also mentioned in the Minutes that the Committee has decided to initially call only M/s. Voltas Limited, the appellant herein, for the technical discussion at IPR. It has also been decided to inspect the installations of M/s.KPCL. After taking the decision, the Committee visited the installation on 21.9.2000. At that time, the appellant was not informed about the decision taken by the Committee for opting only for Centrifugal system. In that view of the matter, it is the say of the appellant that no proper opportunity was given to the appellant and that the appellant has already shown their project management capability. Therefore, the decision making process of the Committee is bad. The appellant has given various details about the work, which either were in execution or were executed by them. It is also the say of the appellant that certain works, which were carried out by them, have not been taken into consideration by the respondent No.2 and, therefore, the decision making process is arbitrary. The appellant, in substance, has also challenged the decision of the Committee on the ground that it suffers from the vice of arbitrariness and discrimination. It is also stated by the appellant that even though this Court may not sit in appeal over the decision of the Committee, still, the Court can go into the question of decision making process to find out whether it was just or not or whether it was suffering from the vice of irrationality, viz., Wednesbury's unreasonableness.

11. We have heard the arguments of both the sides in detail and we have also gone through the various documents submitted by both the sides. We have also considered the case law cited by both the sides.

12. It is not in dispute that the Project in question is a very important National project and for the aforesaid Project, the respondent No.2 wanted the best available person, who can complete the job satisfactorily and without any difficulty. It is also required to be noted that this Court is not sitting in appeal over the decision of an expert body or an expert committee, which is possessed with technical knowledge of the subject. It is also not possible for this Court, therefore, to substitute its own decision on merits for that of the Authority vested with the decision making process. Even otherwise, the Court is not qualified to pronounce upon this technical subject. What is required to be seen is whether the decision making process was in a just and proper manner and whether relevant facts and circumstances of the case were considered by the Committee and whether all the parties were also given equal chance to prove their credentials before the Expert Committee.

13. Keeping the aforesaid principles in view, we may now examine the contentions of Mr.Desai for the appellant.

The first argument of Mr.Desai is that as per the schedule of quantity (Part A1), Item No.(A) options for both the items, i.e. 1.A and 1.B, were required to be quoted and since the other tenderers have not quoted both the options, their cases were not required to be considered further and that the appellant, who quoted both the options, was the only eligible person who remained in the fray.

14. Mr.Vakil for respondents 1 and 2 pointed out that the water chilling machines with centrifugal compressor was essentially the main requirement and as such, the same was suitable for the nature of work which was to be executed as compared with water chilling machines with screw compressor. He submitted that in any case, the appellant was also given an opportunity by the Committee to show whether any particular work of a similar nature has been carried out by the appellant in connection with water chilling machines with centrifugal compressor operating on R-134a Refrigerant. At this stage, the Minutes of the third meeting of the Tender Award Committee on award of contract of SST1-Water Cooling

System, produced at page 256 of the compilation, is required to be considered. All the members of the Committee were present in the said meeting, which was held on 19.10.2000. In the Minutes of the said meeting, it is noted by the Committee in paragraph 21 as under :-

" ... ...

21. M/s PAT introduced their company profile and the team members. M/s PAT have executed number of Air conditioning and ventilation jobs and a few HVAC systems in collaboration with M/s BSL & M/s. Voltas Ltd. M/s PAT has not executed jobs similar to the one in scope of the present tender. They, however, claimed to have the man power having variety of technical exposure and capable of designing & execution of this type of jobs. They have gone through the tender documents carefully and understood the P-1 diagram supplied by IPR. They propose to do the design in-house. They have installed clean rooms with closed cycle humidity control and a number of chemical process cooling systems. They do not have experience with centrifugal chillers and machines operating on refrigerant R-134a.

... ... "

Regarding respondent No.3, the Committee has found in paragraph 24 as under :-

" ... ...

24. M/s KPCo introduced their company profile and the team members. The committee noticed that M/s KPCo has executed jobs similar to the one in scope of the present tender, at several places covering more than 90% of items. M/s KPCO expressed that they will execute IPR job right from design to commissioning without involving any consultants. They also informed the committee

> that they have executed several projects on their own. M/s KPCo Ltd. also showed some of installations having 80% of items similar to IPR job. The committee noticed that they have understood fully the P&1 diagram submitted along with the tender document. They have executed several centrifugal machines operating on R-134a refrigerant. They have also installed more than 300 TR capacity centrifugal machines at various places.
>
> ... ... "

It is also further found by the Committee in paragraph 25 that since the appellant has no experience in the execution of jobs similar to the one in scope of the present tender, it does not have confidence on system design in the absence of consultant and does not have relevant experience with centrifugal chilling machines operating on R-134a Refrigerant. The Committee opined that the appellant is not technically qualified to carry out the job in question and on that ground, it was decided to reject the offer of the appellant.

In the aforesaid circumstances, the Committee, therefore, was of the opinion that so far as respondent No.3 is concerned, since it has executed centrifugal machine, operating on R-134a Refrigerant, it was found that they are technically competent to execute the work. Respondent No.3's offer was also found as the lowest cost technically acceptable offer. On that basis, the Committee decided to award the contract to respondent No.3.

15. Mr.P.G. Desai, however, argued that insistence on R-134a Refrigerant was uncalled for. He submitted that the respondent No.2 should have otherwise clearly stated that they are going to insist upon R-134a Refrigerant at the time of inviting the tender. It is no doubt true that it has been clearly mentioned in Schedule of quantity that both options regarding 1.A and 1.B were required to be quoted and the appellant had quoted both the options. However, considering the nature of work and type of project, etc., when it seemed that the main and basic requirement was regarding water chilling machine with centrifugal compressor, if it was found by the Experts that it was more suitable for the nature of work

to be carried out, it cannot be said that simply because other tenderers have not quoted both the options, they were required to be disqualified from further consideration. So far as the present appellant is concerned, the question which is required to be considered is whether its case for the job in question was considered by the Committee or not. If some stranger has not taken part in the tender having been misguided by the aforesaid Note of quoting both the options, the same may stand on a different footing, but the present appellant has already taken part and its tender has already been considered on merits and, ultimately, if the authority has decided not to reject the tenders of other tenderers on the said ground, it cannot be said that the tender of respondent No.3 was required to be rejected without being considered further only on the ground that the respondent No.3 had not quoted both the options. The question which is required to be considered is whether the decision of the Committee in treating the appellant as not technically qualified was proper or not and whether adequate opportunity was given to the appellant to project before the Committee the work which it has carried out.

16. Mr.Vakil has pointed out that as per the commercial terms and conditions, the bidders were informed, by way of instruction, that failure on their part to comply with the instructions contained in the tender notice shall entail disqualification of their tenders and the said tenders were liable to be rejected. According to him, the said option is with the respondent No.2 and not with the bidder. According to him, the purchaser was entitled to purchase best quality as per the requirement, and looking to the nature of the project if the Expert Committee found that respondent No.3 was technically more sound so far as execution of the work in question is concerned, it cannot be said that the decision of the Committee is, in any way, arbitrary or illegal. The T.A.C., which comprised of Experts, in its first meeting concluded that it should go in for centrifugal chillers running on R-134a Refrigerant due to its technical superiority, and after evaluating all the tenders, the TAC decided to seek technical clarifications from all the vendors to enable the TAC to evaluate the offers further and since the appellant's bid was commercially lowest, it was given first preference by calling for techno-commercial discussions on 29th September, 2000. TAC also authorised a team to visit and evaluate the installations of the appellant and as per the say of respondents 1 and 2 in the affidavit-in-reply, the appellant failed to show any installation with

process cooling equipment similar to what the said respondents were looking for. Now, whether what was shown to the Committee by the appellant was sufficient or not, is a question which this Court cannot decide, as, ultimately, this being a technical subject, it is for the Experts to arrive at the subjective satisfaction on the same. It is also pertinent to note that as per the letter dated 26.9.2000, addressed by the respondent No.2 to the appellant, it has been pointed out that during the visit to Mumbai, along with the representative of the appellant, they could not show full package of system/s or major portion of systems coverage. In that letter, it was specifically stated that the appellant may furnish the list of installations which were mentioned in the said letter and one of the items mentioned in the said list was Water Chilling Machines more than 300 T.R. particularly centrifugal, using R-134a Refrigerant, running on microprocessor/PLC based control system. There is further correspondence between the appellant and the respondent No.2 in this connection. One of such letters is the letter of the appellant dated September 28, 2000. The appellant, therefore, was given an opportunity to show similar type of project in connection with centrifugal water chilling machines running on R-134a Refrigerant. The appellant, therefore, was given that opportunity and it was understood by all concerned at that stage that the requirement is regarding chilling machines more than 300 TR, particularly centrifugal using R-134a Refrigerant. We are not concerned with the nature of work the appellant had undertaken. The question is whether there was any material with the Committee about the nature of the work the appellant carried out in water chilling machines more than 300 TR, particularly centrifugal using R-134a Refrigerant. The Committee, in its report, has elaborately dealt with the said question and on the basis of the evaluation of the comparative work carried out by the appellant and the respondent No.3, it was found that the appellant would be technically qualified for executing the work in question. It, therefore, cannot be said that the appellant was not given an opportunity for showing similar type of work. However, ultimately, even the appellant knew, in view of the subsequent correspondence between the parties, that what was required was centrifugal water chilling machines, using R-134a Refrigerant. It, therefore, cannot be said that the appellant's case was not taken into consideration at all. Otherwise, there was no necessity to inform the appellant by such letters by giving opportunity to give particulars as has been given in the letter dated 26th September, 2000.

17. It is not for this Court to say that the respondent No.2 should have awarded the work to the present appellant as it was having experience in Water Chilling Machines with screw compressor and that the requirement about water chilling machines with centrifugal compressor was not of any importance. It is the say of the respondent No.2 that item No.1.A was, in fact, the basic requirement and that item No.1.B was not that of much importance. This being a purely technical subject, it is not open for this Court to give its opinion on the same. Suffice it to say that the appellant herein was given an opportunity by the Committee to prove its credentials and to give particulars about the project, which they have undertaken or completed regarding centrifugal water chilling machines, using R-134a Refrigerant and when such opportunity is given to the appellant, it cannot be said that, from the very beginning, the respondent No.2 was only interested in awarding the work in question to respondent No.3 and insistence on gas component of R-134a Refrigerant was made only in order to favour respondent No.3 as it was the only company which had executed similar type of work. When highly sensitive and technical type of work is to be awarded, naturally the Committee is required to take care of all the facts and circumstances, including completion of the Project in time without any hindrance, as, ultimately, such Projects are of National importance and it has bearing on national economy as well. Looking to the facts and circumstances of the case, as well as considering the documents in question, it cannot he said that respondent No.2 wanted to favour respondent No.3 from the very beginning. There is no basis for making such allegation and the aforesaid allegation is, therefore, without any basis and foundation. Even though two options were prescribed, ultimately, it was found by the Committee that the basic requirement was centrifugal compressor, with R-134a gas component. For that the appellant was given adequate opportunity also to show similar type of work and if at the relevant time, the appellant failed to show it and on that basis, the Committee has arrived at a subjective satisfaction, we cannot scrutinise each and every aspect of the matter minutely to find out whether the Committee's decision is right or wrong. Prima facie, we are satisfied that the appellant was not meted out any discriminatory treatment by the Committee. It is, in fact, not in dispute that so far as the work of centrifugal compressor, with R-134a Refrigerant is concerned, the respondent No.3 is more equipped and qualified as compared to the present appellant. The present appellant may be excellent in commissioning air

conditioning system, but, in the present case, so far as the requirement of respondent No.2 for the Project in question is concerned, the Committee found that respondent No.3 is more technically qualified for the job in question.

18. Mr.Desai has also fairly submitted that he is not making any allegation against any of the Members of the Committee that they have acted with prejudice against the present appellant in any manner. Even in the petition, there is no allegation against any of the Committee Members. The Committee comprised of independent people and they have made physical inspection at the site where the appellant and respondent No.3 have executed work earlier. It is not possible to go in minute detail regarding each and every thing and regarding each and every correspondence between the parties to find out whether the Committee's decision was just or not. The appellant's case was considered by the Committee for both the options and ultimately, if it was found that, technically, respondent No.3 was more qualified for the job, it cannot be said that there was any arbitrariness in the decision making process on the part of the Committee.

19. Mr.Vakil pointed out that the appellant has not carried out similar type of work and the particulars of work given by it do not inspire confidence and it cannot be said that they were technically qualified for the present work. He also further submitted that, on overall consideration and after visiting the site, ultimately, if the Committee found that respondent No.3 is technically qualified as compared to the appellant, then, this Court cannot go deep into the decision making process of the Committee by examining each and every aspect so minutely as if the Court is undertaking the exercise of awarding the work in question. Considering the aforesaid facts and circumstances of the case, and considering the argument of both the sides, therefore, we are of the opinion that it cannot be said that the Committee has acted either in an arbitrary manner or wanted to favour respondent No.3 when it had decided to give the work in question to the respondent No.3. When no case of mala fides is alleged against the Committee Members and there is no allegation against the Committee in any manner, it is not possible for us, as stated earlier, to substitute our decision on merits for that of the Authority vested with the decision making process. We, accordingly, do not find any substance in the argument of Mr.Desai that since both options were not given by respondent No.3, its case should not have been considered further. As stated

earlier, the appellant was given opportunity regarding the work in question, and ultimately, the Committee may not have found it suitable for the work in question, which is an entirely different thing, but its case was considered even for Water Chilling Machines with R-134a Refrigerant. It also cannot be said that the decision making process was vitiated in any manner either by way of arbitrariness or unreasonableness or even by discrimination.

20. A comparative study of the work executed by the appellant and the respondent No.3, which was undertaken by the Committee is produced at pages 245 to 250 and it was ultimately found as under :-

> " ... ...
>
> Overall Conclusion :
>
> Based on the above visits vis-a-vis, various installations, and the system requirement of SST1-WCS, ... Vendor Capability assessment by the sub-committee is that M/s. KPCo Ltd. has more practical experience in hands than M/s. Voltas Ltd.
>
> ... ... "

It is, therefore, not possible to believe that from beginning, it was decided to hand over the work to respondent No.3. Otherwise, there was no question of entering into correspondence with the present appellant, asking it to show similar type of work which they have undertaken. On all the aforesaid grounds, therefore, it is not possible to believe that the appellant was not given adequate opportunity to exhibit the work which it has undertaken. There are also no allegations against any of the Committee Members. In that view of the matter, we do not find any substance in the allegation of the appellant that the decision making process is vitiated by arbitrariness or mala fides in any manner. We also do not attach much importance to the fact that respondent No.3 or other tenderers have not given second option and ultimately, no prejudice is caused so far as the present appellant is concerned as its case was considered on its own merits by the Committee in order to find out whether it was technically qualified for the job or not. It is not open for the appellant, therefore, to make any grievance on this aspect.

21. Mr.Desai, at one point of time, argued that the

Committee had also considered certain photographs produced by the respondent No.3 regarding equipments, viz., Centrifugal Chilling Machines, pumps, etc., and on that basis, it was found that they were more technically qualified. According to him, therefore, there was not enough material for the Committee to arrive at such conclusion about the capability of the respondent No.3. However, it is not for us to say whether there was enough material with the Committee to find out the suitability of respondent No.3 or not. On a comparative study, ultimately, it was found that the respondent No.3 was more technically sound for the purpose of commissioning the Project, and, therefore, it is not open for us to say that the material in question is not sufficient for coming to such a conclusion. Even otherwise also, it cannot be said that there was no sufficient material for coming to such a conclusion. It is also not possible for us to go into each and every event which had taken place before ultimate decision was taken by the Committee. On overall consideration of the matter, it cannot be said that the action of the respondent No.2 suffers from arbitrariness or that the appellant was subjected to any discriminatory treatment. It also cannot be said that any favouritism was shown by the respondent No.2 in favour of respondent No.3. It also cannot be said that the Committee has shown favouritism by agreeing to a deviation in favour of respondent No.3. As a matter of fact, it cannot be said that any discrimination has resulted by such deviation in favour of respondent No.3. When the appellant was not found as technically qualified for the work in question as respondent No.3, it is not open for it thereafter to make further grievances when subsequently the proceedings have proceeded further regarding ultimate decision of awarding the work. It is also not possible for us to go deep into the details of the work executed by the appellant and the respondent No.3 to find out whether the decision of the Committee is correct or not. On overall consideration of the matter, and considering the nature of the work to be undertaken, ultimately, if it was found that it was safer and advisable to allot the work to respondent No.3, it cannot be said that the said decision can be branded as arbitrary, illegal or discriminatory.

22. Mr.Desai challenged the decision making process by submitting 18 points. They are as under :-

> "1. It was mandatory to quote both the options as per note on page No.129 of tender and clause No.1.2.1 and 10.2 of tender

commercial conditions; otherwise tender was supposed to be rejected. Committee has not considered this fact, hence decision making process is improper and not correct.

2. Committee is constituted after opening of prices of all the tenderers hence the decision making process is improper.

3. Committee has decided on 22nd August, 2000 to opt for Centrifugal Chillers but this decision was not conveyed to petitioner M/s. Voltas till completion of their site inspection and hence the decision making process is not correct and improper.

4. M/s. IPR themselves have conveyed to bidders for showing installation having capacity of Chillers more than 300 TR. However, during site visits of M/s. KPCL they have not visited any installation of M/s. KPCL having capacity of more than 300 TR. whereas in case of M/s. Voltas, they have visited sites having capacity of more than 300 TR. which itself shows favouritism hence the decision making process is improper.

5. M/s. Voltas was called for a techno-commercial discussion on 29-09-2000 and no briefing as regards type of questions to be asked during meeting were conveyed to M/s. Voltas. However, M/s. KPCL was given a briefing about this by committee members on 09-10-2000 prior to their meeting on 19-10-2000. In its meeting, committee members have explained M/s. KPCL how to present their case in order to get the job. This shows favouritism to one party by M/s. IPR and hence the decision making process is not correct and improper.

6. Terms of payment as per clause No.19 was kept negotiable and M/s. KPCL was subsequently given an advance of 20% which is very high by any standards in such kinds of tender. M/s. Voltas was not given any advance in the job of value of Rs.1.7 crores which they have executed last year in the same IPR premises. Hence the

decision making process is not proper and norms of institute are changing from vendor to vendor.

7. The tender estimate of this job as indicated in tender notice was Rs.696 lakhs whereas M/s. IPR is awarding this job to M/s. KPCL at total contract value of Rs.887 lakhs ignoring the lowest price quoted by M/s. Voltas for option 1 at Rs.831 lakhs and for option 2 at Rs.796 lakhs and rejecting Voltas on flimsy grounds.

8. Committee has stated that price was not the sole criterion for finalizing the order then in that case why they have not carried out the site visits of other bidders who are also leading players in the field such as Blue Star Limited, Patel Airtemp, IDMC and Nicco Corporation. Hence the evaluation process itself is improper and suffering from favouritism.

9. It is evident from technical report that none of the bidders is having experience of R-134a refrigerant except M/s KPCL which shows that M/s. IPR has shrewdly picked the option which will favour only M/s. KPCL their favourite vendor in order to eliminate all other bidders hence decision making process is improper and not correct.

10. Committee has not considered an important fact that petitioner has committed to complete this job in 15 months, whereas M/s. KPCL would be completing this work in 18 months. No consideration was given to this important fact hence the process is improper.

11. It is explicitly clear in clause 5.2 that Excise duty exemption certificate will be issued to the firm quoting against this tender. However, in LO1 it is mentioned that Excise duty exemption certificate will be issued by IPR not only in favour of KPCL (quoting firm) but also in favour of other group companies like M/s. Kirloskar Mcquay Limited and M/s. Kirloskar Brothers Limited. Extending such undue benefits is

in total violation of the tender conditions and will cost Government exchequer by more than Rs.50 lakhs. Distributing of such important exemption certificate which affects Government exchequer directly at whims and fancies of individuals itself shows irregularity in tendering process.

12. Report of site visit was signed by one of the members on 29.09.2000 which shows that this committee member was not shown Voltas letter dated 28-09-2000 hence M/s. IPR has kept the technical committee in dark and so this decision making process not correct and improper.

13. Out of five members who have visited the sites, one member was Purchase Officer without any technical qualification and other member was Accounts Officer without technical qualification seeking / asking for technical comments from these persons is ridiculous and hence the entire tendering process is not correct.

14. It is understandable from tender notice dated 13.12.99 that M/s. IPR is interested in experience of firms in last 5 years whereas M/s IPR has visited sites of M/s. KPCL where execution was done prior to five years. Hence this is self contradictory and so the decision making process is improper and not correct.

15. Tender award committee has not covered its criteria No.3 i.e. Quantum of job executed. This information was not compared between two vendors which was available with Tender Award Committee in form of Balance Sheet of all the companies which they have collected during prequalification. It is explicitly clear from Voltas document that Voltas has done total 2309 projects in last three years. Corresponding information for KPCL was not compared or at least not reflected in technical committee report and hence the decision making process is improper.

16. Committee has not adhered to its criteria No.4 i.e. Quality and Workmanship of

various jobs. Committee has not sought any report from list of customers given by Voltas in their letter dated 31.12.99 about Quality and Workmanship. Moreover, no customer of either M/s. Voltas or M/s. KPCL has complained about quality and workmanship of both companies. This information were not reflected in the report and hence the decision making process is not correct.

17. Committee has not considered its criteria No.5 i.e. Organising / Resource mobilising. It is evident from the report submitted in our affidavit that M/s. KPCL wants to (exit) quit from contracting business and wants to limit itself to product supplies only. The report is as latest as 02-10-2000. This important fact was ignored by committee & concealed by M/s. KPCL and hence the decision making process is improper and not correct.

18. Committee has not followed its criteria No.7 After Sales Service. Committee has not considered that M/s. Voltas has got full-fledged office in Ahmedabad which is nearest place from IPR Installations. M/s. Voltas has about 15-20 persons exclusively devoted for rendering After Sales Service to its customers whereas M/s. KPCL has not got any proper service set up in Ahmedabad and they have got only one person in Ahmedabad that too, looking after all the activities like selling, project management, engineering and service. This is also evident from letter of BSNL which clearly states that M/s. KPCL has not got any service set up in Ahmedabad.

... ... "

23. Respondent No.3 has given reply to the above 18 points, saying that there is no substance in any of the aforesaid points. The reply of the respondent No.3 is as under :-

" ... ...

Re : Point No.1 :-

Basically, the offer was invited by IPR for Centrifugal Chilling Machine with R-134a only and quantity thereof was given as 3 Nos. (Please see page 126 of Tender Specifications, i.e. Schedule of Quantity (Part-A1).

On the other hand, rates were only asked for Screw Chillers without any reference to any particular quantity. As a result thereof, no firm offer could have been given for the project in question by any of the bidders including Voltas, which only demonstrates that so far as screw chillers are concerned, the requirement of quoting the rates was only in the nature of the tender inquiry.

M/s. Voltas has submitted unfilled tender for centrifugal chilling machine with R-134a. However, same has been considered by IPR and details were asked after opening of tender. (Please see correspondence between Voltas and IPR at pages 79 at page 80, page 65, 66, 68 and 69-70 as well as page 71 to 75)

Hence it is unimaginable as to how Voltas can say that they are lowest in the Screw Chiller Offer when the quantity thereof has not been specified.

Re : Point No.2 :-

Committee is normally constituted only after tender opening. In any case, this point has not been pleaded nor taken before the learned single Judge.

Re : Point No.3 :-

M/s. Voltas was informed by IPR vide letter dated 26th September, 2000 (page nos. 69 and 70) that whatever they have shown is not as asked for and they were again requested to show process cooling plant particularly with following :

a. Centrifugal chiller with R-134a.

b. Plate Head Exchanger (stainless steel).

c. Stainless steel pressure vessels / tanks.

d. Stainless steel pumps and piping.

e. Scada system, etc.

Installations offered by M/s. Voltas to TAC team was not having even one installation of

a. Plate Heat Exchangers.

b. Stainless steel pressure vessels/tanks where special technology is required.

c. Stainless steel pumps and pipings.

d. Scada system.

All these items are contributing around 41% of total IPR requirement in addition to Centrifugal Chiller with R-134a, which is contributing 28% of the requirement.

M/s. Voltas has not shown even single installation pertaining to above requirement.

Instead of offering visit of similar type of installations or showing their own capabilities, M/s. Voltas has submitted a list of Air Conditioning sub-contractors and suppliers which too was unrelated with IPR requirement (Refer Pages 71 to 75 - letter of Voltas - Dt. 28/9).

Above clearly shows that enough opportunity was given to them but they failed repeatedly. This proves that they don't have capacities thereon as well as experience for execution of similar type of job as required by IPR in its tender documents and aforesaid correspondence. In any case, the Committee's decision for opting for centrifugal chillers is only in consonance with the tender specifications where firm offers were required to be given for centrifugal chillers with R-134a Refrigerant.

Re : Point No.4 :-

M/s. KPC has shown one installation of Centrifugal Chilling Machine with R-134a Refrigerant at Hotel President capacity : 300 TR and not 250 TR as stated by the appellant. Letter from Hotel President confirming the same is enclosed.

M/s. KPC has shown two installations of Process Cooling where we had shown following, i.e. at M/s. Colour Chem, Mumbai and at M/s. HLL, Nasik.

a. Plate Heat Exchangers (Stainless Steel - 7 Nos.)

2 No's at Colour Chem, Mumbai, and
5 No's at HLL, Nasik.

b. Stainless steel pressure vessels / tanks.

c. Stainless steel pumps and piping.

d. MS Tanks, Piping, Structure, Pumps, etc..

e. Scada system partly at Colour Chem and 100% at HLL, Nasik.

Above all we have proved our designing and execution capabilities which are similar to IPR requirements in addition to customer's satisfaction regarding after sales service and availability of spares.

We have shown one installation of Centrifugal Chiller of R-134a Refrigerant at Hotel President though we have more than 70 such installations. Not only that, as many as 8 projects have been successfully executed by Kirloskar using R-134a Refrigerant in the Department of Atomic Energy itself.

Installations shown by Kirloskar at M/s. Colour Chem and M/s. HLL were basically to show them process cooling plant with plate heat exchangers, Scada system, SS pressure Vessels / Piping Etc., and our designing capabilities.

Re : Point No.5.

Refer page No.252, point No.14 which reads as under :

" The Committee Chairman constituted a Sub-committee, comprising of Prof. Y.C. Saxena, Dr.D. Vora and Mr.G. Govardhan to organise one round of technical discussions with each of the remaining bidders before 19th October, 2000 and visit some of their installations if offered by the parties. "

In the meeting prior to 19th October, 2000 with above sub-committee, we were present with Chief Engineer Design along with our design and execution team and explained in detail our capabilities of designing and execution of similar type of system including quality assurance plant, piping & instrumentation drawings, various site execution drawings, photographs, Scada system installed by us and its working at NDDB, Bangalore on the Screen through multi-media/Laptop etc.

We have also discussed the similar type Project shown to TAC team. In any case, the performance, experience and quotations of all the remaining tenderers have been considered by the TAC irrespective of their having quoted either or both of the options, which only demonstrates the fair approach and the fairness in the procedure for selecting the most eligible and qualified bidder.

Re : Point No.6 :-

As per tender specifications, payment terms are negotiable. Wherever advance payment is involved, it will be paid only against Bank Guarantee from Nationalised/Scheduled Bank (Refer page 177 i.e. internal page 14 of the commercial bid).

Following payment terms offered to us as per Letter of Intent :

10% payment is to be paid as advance against BG &

10% payment against submission of approved drawings.

60% payment against delivery and inspection of material.

05% payment against pro-rata erection/installation.

15% payment after commissioning and handing over the plant.

Approval of drawing is possible only when entire system is designed and here in this process cooling system, designing part is very important and very critical because chilled water is to be delivered not at one place rather at different different places with different different pressure at different different temperature with specified flow rate.

This designing is contributing substantial amount including involving of one Autocad-2000 specially for this purpose continuously at least for 6 to 8 months. In addition to putting specified design and R&D Team, no. of Softwares, CAD system, etc.

Since M/s. Voltas is not understanding designing part of the system the said issue as raised by Voltas a disqualified bidder is of no consequence.

Success of entire system depends on proper and effective designing system in addition to expertise of execution of similar type of job.

M/s. Voltas has not stated anything regarding 15% payment to be paid after commissioning and handing over the plant which in 90% cases is 5% only.

Re : Point No.7 :-

M/s. KPCL is the lowest technically qualified bidder for the project in question for option 1-A as required in the tender specification.

Re : Point No. 8 :-

When M/s. Voltas failed to show similar type of installations, M/s. KPC was asked to show the

similar installation being L2 Price-wise after M/s. Voltas (Please see TAC report at page 244).

When we have satisfied them with similar type of installations in addition to our designing capabilities and since our offer has much lower than other technically acceptable bidders, visit of other bidder's was not required. In any case, the potential of the other bidders has also been taken into consideration by the TAC by calling each of them and examining the relevant criteria.

All other bidders were much higher to us as stated below against our quoted price of Rs.8,87,00,786.00

a. M/s. Patel Airtemp Rs.9,78,48,466.00

b. M/s. I.D.M.C. Rs.10,32,70,240.00

c. M/s. Blue Star Ltd. Rs.10,44,01,740.00

d. M/s. Nicco Corp Rs.11,42,61,494.00

Re : Point No.9 :-

IPR had called for firm offers for the project in question using three units of Centrifugal Chillers with R134a Refrigerant and hence no fault can be found for selection of the said gas, which is in any case ozone friendly Refrigerant and as per the conclusions of the Montreal Protocol.

Re : Point No.10 :-

M/s.Voltas does not have experience of execution of similar type of jobs and has not understood the exact requirement of IPR hence time period of 15 months given by them has no sanctity.

Re : Point No.11 :-

IPR is allowed to issue excise exemption certificate (Refer Budget Notification Central Excise Exemption to specified goods, supplied to

specified institutions, Central Excise, at 1944) which exempts goods falling under the Schedule to the Central Excise Tariff Act 1985 (5 of 1986) from the whole of the duty of excise leviable thereon when supplied to the scientific institutions. Copy enclosed.

Re : Point No.12 :-

This point has not been pleaded nor taken before the learned single Judge.

Re : Point No.13 :-

During site visit, these members were there to find out the potential. This point was not urged before the learned single Judge.

Re : Point No.14 :-

This point was not pleaded nor taken before the learned single Judge. All the installations shown to TAC was commissioned in last 5 years. There was a typographical error in the report where 1998 was mentioned as 1993 for M/s Colour Chem (Please see page 248). We are enclosing a certificate from M/s. Colour Chem where it is stated that units have been commissioned in the year 1998.

Re : Point No.15 :-

This point was not pleaded nor taken before the learned single Judge. In any case, what is to be ascertained is the potential to execute similar jobs and not tall claims of number of projects executed irrespective of whether they are similar or not.

Re : Point No.16 :-

Quality and workmanship of similar type of job shown by KPC were seen and confirmed by the end user to TAC during their inspection.

Re : Point No.17 :-

M/s. KPCL is pioneer in process cooling, Refrigeration and Air conditioning business inclusive of package AC's, etc. for last so many years. We are well known for introducing latest technology in India and we were the first to introduce Centrifugal Chiller in India with R-11/R-12 Refrigerant with the collaboration of M/s. Hitachi, Japan and again we are the first to introduce the latest technology, Centrifugal Chiller in India with R-134a Refrigerant with the collaboration of M/s. Mcquay, USA.

As on date, more than 90 jobs of process cooling, Refrigeration, air conditioning, etc., are in execution stage and No. of projects are in pipe line for which we are at designing stage. Some of the prominent jobs are as under :

a. For M/s. I.O.C.L. through L&T Ltd. process cooling/Refrigeration-value Rs.951 lakhs.

b. Hindustan Aeronautics Ltd. Central AC Order taken on 22nd November, 2000 with Centrifugal Chilling Machine working on R-134a Refrigerant capacity - 300 TR.

c. Statesman, Central AC, value Rs.340 lacs.

d. Bharat Sanchar Nigam Ltd., at various places package AC units, worth Rs.540 lacs.

e. Gujarat State Fertilizer Corporation of India, process cooling, value Rs.230 lacs.

f. M/s. Afcon Infrastructure Ltd., process cooling/refrigeration.

g. M/s. Sajjan India Ltd., process cooling/refrigeration.

h. M/s. HLL at Pondicherry, Goa, Khamgaon and ORA1 process cooling/refrigeration.

Re : Point No. 18 :-

M/s. KPC has full fledged office with service set up at Ahmedabad since 1970 with all type of execution and service engineers for process cooling as well as for air conditioning in addition to our other office in Gujarat.

We have service set up for process cooling as well as air conditioning jobs whereas M/s. Voltas has service set up only for Air conditioning jobs like window AC, Split AC, Central AC and water coolers.

M/s. Voltas has access to see the correspondence between BSNL and KPCL and has presented only one side of story by producing only BSNL letter without submitting the reply submitted by us on the next day of receiving the letter dated 2nd November, 2000 (pages 97 to 100) which clearly states that we were supposed to operate the plant as per agreement upto 7th June, 2000. However, we have operated the plant without charging any amount to M/s. BSNL upto 31st July, 2000 on request from their Executive Engineer and handed over the said plant on 1st August, 2000 for onward operation and maintenance.

However, it was observed that plant was not maintained. Not even preventive and routine maintenance were carried out and was operated by one unskilled person (not technically qualified/experienced).

One operator was looking after operation of above plant as well as following other plants as under :

a. AC plant installed by M/s. Voltas.

b. Diesel Generating Sets.

c. Battery room plant.

How can BSNL expect performance of the plant up to the mark when one unskilled non-technical man of BSNL operating various plants simultaneously without knowing the operation and maintenance of the plant when maintenance was not part of his

job.

We have supplied 367 packages AC units to BSNL, Ahmedabad and out of which 300 units have already been commissioned and handed over. Installation work for balance units are in progress, which are supplied recently.

All above have been executed and commissioned by our Ahmedabad Office in addition to other central AC, process cooling and refrigeration jobs which shows capabilities of our Ahmedabad office.

... ... "

All the above 18 points raised by the appellant have been controverted and effectively dealt with by respondent No.3.

Now, as per our above discussion, we have reached the conclusion that it cannot be said that there was any arbitrariness in reaching the conclusion. Considering the peculiar need of the Project, the decision was taken by the Committee to award the contract to the respondent No.3. It is also not in dispute that the appellant was not having any experience of Centrifugal Water Chillers with R-134a Refrigerant and the respondent No.3 was having better experience in this particular work. Considering all these circumstances, therefore, it is not possible to believe that there was any arbitrariness or favouritism on the part of the Committee in accepting the tender of the respondent No.3.

24. Even so far as the payment of excise duty is concerned, the respondent No.2 is the Central Government organisation and the machinery supplied to it are eligible for excise duty exemption. If the sister concern of the respondent No.3 is given excise duty exemption, in that case, there may not be any question of exemption of excise duty to respondent No.3. Therefore, the submission of Mr.Desai that the respondent No.3 will make illegal profit in excise duty does not appear to be a sound one. The Excise Department of the Government and respondent No.2 will surely see that whenever the sister concern of respondent No.3 is given exemption from the excise duty, the said exemption is not given to the respondent No.3. Even Mr.Nanavati has also made a

statement to that effect.

25. No doubt, it may be true that in the Letter of Intent, some changes are disclosed, but we do not think that it materially affects the total execution of the project. During the execution of the work, there may be some deviations, but such deviations are of minor nature and in any case, it may not form the basis for rejection of the tender of respondent No.3.

Under the aforesaid circumstances, therefore, it cannot be said that the award of contract in favour of respondent No.3 is either arbitrary, illegal or mala fide.

26. At this stage, reference is required to be made to certain decisions cited by both the sides. Mr.Desai for the appellant has cited the decision in Harminder Singh Arora v. Union of India and others, (1986) 3 SCC 247. The Supreme Court has laid down that the Government may enter into a contract with any person, but in so doing, the State or its instrumentalities cannot act arbitrarily. In absence of any specific policy of the Government, it is open to the State to adopt any policy. But if the authority or the State chooses to invite tenders, then it must abide by the conditions laid down in the tender notice and cannot arbitrarily and capriciously accept a much higher tender to the detriment of the State. If the tender form submitted by any party is not in conformity with the conditions of the tender notice, the same should not have been accepted. In any case, if the authorities chose to accept the tender of the respondent in the said decision for supplying pasteurized milk, instead of fresh buffalo or cow milk as specified in the tender notice, the appellant therein should also have been given an opportunity to change his tender. However, so far as the facts of the present case are concerned, as we have discussed above, the appellant herein was also given adequate opportunity for the purpose of showing the work, which it has executed so far as Centrifugal Chillers with R-134a Refrigerant are concerned. Even otherwise, the appellant was not found technically qualified for the job in question and respondent No.3's tender was accepted and grievance cannot be allowed to be ventilated at the instance of the present appellant.

27. Mr.Desai, thereafter, has relied upon the decision of the Apex Court in Sterling Computers Limited v. M/s M & N Publications Limited and others, (1993) 1 SCC 445. In the aforesaid judgment, the Supreme Court

has said that the State action in commercial / contractual transactions with private parties must be in consonance with Article 14. The decision making process of public authorities, if influenced by extraneous / irrelevant considerations would vitiate the decision even if it is without bias. It has been said in the said decision by the Honourable Supreme Court that if the decision is taken by the public authority in commercial / contractual transactions of State or its instrumentality, the decision making process is open to judicial review. Though the Court cannot act as an appellate authority, if the process is violative of Article 14, court can strike down the decision and action taken pursuant thereto. In the instant case, it cannot be said that the decision making process is vitiated in any manner and we have discussed the aforesaid aspect, in detail, in the present judgment, as stated earlier.

28. Mr.Desai has thereafter relied upon the decision of the Apex Court in Tata Cellular v. Union of India, (1994) 6 SCC 651. In the aforesaid judgment, the Supreme Court has said that only the decision-making process and not the merits of the decision itself is reviewable as court does not sit as appellate court while exercising power of review. The Supreme Court went on to lay down the test as to when a decision / action taken by the Government is open to review and held that while court cannot interfere with the Government's freedom of contract, invitation of tender and refusal of any tender which pertains to policy matter, the court can look into whether the decision / action is vitiated by arbitrariness, unfairness, illegality, irrationality or `Wednesbury unreasonableness', i.e. when a decision is such as no reasonable person on proper application of mind could take, or procedural impropriety. Relying upon the said judgment, it was argued by Mr.Desai that there is still scope for judicial review available if it is found that the process for reaching the decision is arbitrary or is vitiated. It is no doubt true that judicial review is permissible in that limited area, but after going through the report of the Expert Committee and the reasoning given by the Committee for awarding the work to the respondent No.3, it cannot be said that there is any arbitrariness or favouritism for reaching that conclusion.

29. Mr.Desai, thereafter, relied on the decision of the Supreme Court in Food Corporation of India v. M/s. Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71, by stating that there was a reasonable expectation on the part of the appellant to get the contract. In the

aforesaid judgment, the Supreme Court has stated as under :-

" ... ...

In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law : A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is `fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

... ...

The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the

> principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent.
>
> ... ... "

However, it cannot be said that the appellant was subjected to any unfair or discriminatory treatment and the appellant can plead for legitimate expectation regarding consideration of its case on merits without there being any discrimination and it cannot be said that its case was not considered on merits by the respondent No.2 or that it was subjected to any discrimination in consideration by the respondent No.2.

30. In the decision in Union of India and others v. Hindustan Development Corporation and others, (1993) 1 SCC 467, the Supreme Court had an occasion to consider the justification for different rates for big and small manufacturers in awarding Government contracts for manufacture and supply of cast steel bodies to Railways. In the fixation of price and allocation of quota, dual pricing policy was adopted by Railways to break monopoly of big manufacturers and to encourage small manufacturers to become viable for open competition. Identical tender offers were quoted by three big manufacturers. Post tender offers were also made by them uniformly quoting a lower price. Railways considered such price to be an unreasonable price for smaller manufacturers and entertained a suspicion that the big manufacturers had formed a cartel for securing larger quantities and creating a monopoly. Accordingly, Railways gave counter

offers at the quoted lower rate to the big manufacturers and at a higher rate to the smaller manufacturers. The Supreme Court held that the big manufacturers must be deemed to be in a position to supply at the lower rate quoted by them and thus they formed a distinct category and, therefore, the different price fixed was not discriminatory. Even though there was not enough material to establish formation of cartel by the big manufacturers, suspicion in that regard entertained by the Railways, including the Minister, was not per se malicious or actuated by extraneous considerations. The Supreme Court held that the High Court erred in directing that all the manufacturers should supply at the same lower price. Tender Committee was, therefore, directed to fix a reasonable price for smaller manufacturers considering the data given in support of the lower offer, percentage of profits available to all manufacturers, and other relevant aspects. But, the Supreme Court held that reduction in allotment of quota of bogies for big manufacturers by the Minister, accepting the suggestion regarding formation of cartel, in absence of firm foundation therefor, was not justified and directed that the Minister for Railways, being the final authority, may take decision in future in the allotment of quota on objective basis. According to the Supreme Court, the Government is also expected to be just and fair in allotment of quotas for smaller manufacturers. At the present stage, the three big manufacturers should be allocated the quantities as per the recommendation of the Tender Committee and the quantities finally allotted by competent authority to small manufacturers need not be disturbed, the Apex Court said. Finally, the Honourable Supreme Court directed that the Railways are entitled to exercise 30% option, if not already exercised, and the time to complete supply was also extended.

31. Mr.Desai, thereafter, relied upon the judgment rendered by a learned single Judge of this Court in S.C. Agrawal v. State of Gujarat & Ors., XXXIX (2) GLR 1405, wherein this Court has held as under :-

> " ... ...
>
> The action of the State in the matter of awarding of the contract has to satisfy that action and that its action is fair and reasonable, when the contract would either involve expenditure from the State Exchequer or augmentation of the Public Revenue. Consequently, discretion in matter of selection of a person for the

> awarding of the contact has to be exercised keeping in view the public interest involved in the selection. Therefore, the Government cannot act arbitrarily at its sweet will like a private individual and deal with any person it pleases but its action must be in conformity with the standard of norms which are not arbitrary, irrational or irrelevant. It is, however, very well recognised principle that certain nature of "fair-play in the joints" is necessary for an administrative body functioning in an administrative sphere. The principles of judicial review would be applicable to the contractual action of the Government in order to prevent arbitrariness or favouritism. There are inherent procedures in exercising these powers of the judicial review. It is expected to protect the financial interests of the State but at the same time the principles laid down in Art. 14 of the Constitution have to be kept in view. It is settled law that there can be no question of infringement of Art. 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered as an arbitrary power; of course if the said power is exercised for any collateral matter or purpose, the exercise of that power will be struck down. The judicial questioning in administrative matter has been to find the right balance between the administration discretion to decide the matters and the fairness in the decision. No doubt there are restraints on the judicial discretion. One is the ambit of judicial intervention and the other covers the scope of the Court's ability to quash an administrative decision on its merits. These restraints are hallmarks of the judicial control of the administrative action. The judicial review is concerned with reviewing not merits of the decision but the decision making process itself.
>
> ... ... "

It is no doubt true that this Court can definitely interfere if there is any arbitrariness or discrimination in the decision making process by which the ultimate

decision can be said to be arbitrary. However, the aforesaid aspect is required to be considered looking to the facts and circumstances of each individual case. At the cost of repetition also we may state that it cannot be said that there was any arbitrariness or discrimination in the decision making process and ultimately, considering the requirement and need, respondent No.2, being the sole judge of its requirement for the work of commissioning the job, gave the contract to respondent No.3. Before the decision was taken to that effect, the Committee has considered merits and demerits of each of the tenderers, the nature of the work and the requirement of respondent No.2. Respondent No.2 is the best judge regarding its requirement and it has right to choose the best person, who, according to it, can execute the work in question. It cannot, therefore, be said that any discriminatory treatment was meted out to the appellant or that the decision or the decision making process is vitiated by any arbitrariness or favouritism.

32. On the other hand, Mr.Vakil has also cited certain judgments of this Court as well as of the Honourable Supreme Court. Mr. Vakil has firstly relied upon the Division Bench judgment of this Court in Prabhudasbhai Bhikhabhai Patel v. State of Gujarat & Ors., XXII GLR 570. In the aforesaid decision, a Division Bench of this Court has held as under :-

> " ... ...
>
> The jurisdiction of the High Court under Art. 226 of the Constitution of India is understandably circumscribed. The High Court will not sit in appeal against the administrative decision to award, or not to award a contract and substitute its own decision for the decision taken by the State Government. The decision to award contract to the respondent company can be quashed and set aside provided and only provided it is established that the decision is arbitrary and discriminatory so as to attract Art. 14 of the Constitution of India. Merely because the lowest bid is not accepted, it cannot be said that the decision is rendered arbitrarily. Completion of the work in an efficient and satisfactory manner at the earliest and within the stipulated time limit is of much

> greater importance having regard to the nature of the work and its impact on the National economy not to speak of the economy of the State. It is no doubt true that global tenders for the main work have yet to be invited. It, however, stands to reason that meanwhile works which are capable of being completed are executed. The Nation can ill afford to waste a moment of national time in the execution of a Project of this magnitude which can (1) augment the agricultural capability of the Nation, (2) add thousands of tons of grain to the National granary, (3) bring a smile on the faces of thousands of cultivators, (4) bring food nearer to the hungry mouths of thousands of citizens and thus alter the economic profile of the entire Nation. If the matter is examined from this perspective and it is realised that respondent No.6 company has executed numerous large projects satisfactorily even at an international level against global competition and has vast experience and can reasonably be trusted to execute the work in the best possible manner in the shortest possible time, it would be evident that a charge of arbitrariness cannot be conscientiously levelled. The decision of the Government is built on the consideration as regards the satisfactory and speedy completion of the work. Having regard to the aforesaid larger perspective it cannot be said that the State Government has acted arbitrarily. In fact the State Govt. might well have been accused of sacrificing National interest for the sake of saving a couple of crores of rupees if it had not realised the significance of and the nature of the work which was to be executed and its importance in the National life.
>
> ... ..."

As stated by us earlier, we cannot sit in appeal over the decision of the Committee or we cannot judge whether the insistence regarding Centrifugal Chillers with R-134a Refrigerant was just or not. The only thing which was required to be considered was whether the appellant was

given an opportunity to show similar type of work or not and, ultimately, if the Committee was of the opinion that respondent No.3 was more technically qualified for performing the work in question, it is not open for us to review the said decision of the Committee. Even otherwise also, we are not qualified to do so as we have no technical expertise or knowledge in this behalf.

33. Mr.Vakil has also relied upon the decision in Raunaq International Ltd. v. I.V.R. Construction Ltd. and others, AIR 1999 SC 393, wherein the Apex Court held as under :-

> " ... ...
>
> When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by Court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the Court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the Court should not intervene under Art. 226 in disputes between two rival tenderers.
>
> ... ... "

34. Mr.Vakil has also cited the decision of the Apex Court in M/s.G.J. Fernandez v. State of Karnataka and

others, AIR 1990 SC 958 to substantiate his say that it is not that the authority inviting tenders cannot deviate or relax the prescribed standard in any situation. But any deviation, if made should not result in arbitrariness or discrimination. The rule laid down in Airport Authority case (1979-3 SCR 1014) comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. In the aforesaid decision, the Supreme Court has also further held that if in the Notification inviting tenders, work experience and annual turnover of prospective tenderers are stipulated as pre-qualifying conditions for supply of blank tender books, the tenderer was also required to submit some documents along with the application for tender books. Supply of documents was not considered consistently and bona fide by authority inviting tenders as pre-qualifying condition and the Apex Court held that the Court would not interfere even though it feels that supply of documents is also a pre-qualifying condition.

35. Mr.Vakil also cited the decision in M/s. Malca Constructions (India) Pvt. Ltd. v. The Madhya Pradesh Housing Board, Bhopal and others, AIR 1990 Madhya Pradesh 49, which is a Division Bench judgment of the Madhya Pradesh High Court, wherein one of us (the learned Chief Justice) was also a party. The Division Bench of the Madhya Pradesh High Court was dealing with a contract for construction of a big building, wherein construction was to be completed within a specified period. Tenders for the said work were called for and all the tenderers were called for discussion and asked to re-submit revised tenders. Repelling the challenge of the petitioner therein, whose revised tender though lowest was not accepted for lack of required experience, the Madhya Pradesh High Court held that the petitioner could not attack grant of tender in favour of other contractor.

36. Mr.Vakil thereafter has relied upon the judgment of Sachidanand Pandey and another v. State of West Bengal and others, (1987) 2 SCC 295, wherein certain land was granted on lease by the Government for the purpose of constructing a hotel. That decision was challenged in public interest litigation. However, the aforesaid judgment has no application so far as the facts of the present case are concerned.

37. Mr.K.S. Nanavati, appearing for respondent No.3, has also argued that there are no allegations against any of the members of the Committee in any manner and that

the Committee has taken an objective decision looking to the facts and circumstances of the case. The said decision of the Committee cannot be reviewed by way of appeal or review by this Court. He has also relied on the decision of the Apex Court in Tata Cellular v. Union of India, (1994) 6 SCC 651.

38. Mr.Nanavati has also relied on the decision of the Supreme Court in Fasih Chaudhary v. Director General, Doordarshan and others, AIR 1989 SC 157, wherein the Supreme Court has held as under :-

> " ... ...
>
> In the matter of accepting proposals for T.V. Serial, there should be fair play. The authorities like the Doordarshan should act fairly and their action should be legitimate and fair and transaction should be without any aversion, malice or affection. Nothing should be done which gives the impression of favouritism or nepotism. While, fair play is an essential requirement, similarly, however, `free-play in the joints' is also a necessary concomitant for an administrative body functioning in an administrative sphere or quasi administrative sphere. Even if all the proposals might not have been considered strictly in accordance with order of precedence, such proposals must have been considered fairly, reasonably, objectively and without any malice or ill-will.
>
> ... ..."

39. Mr.Nanavati has also relied upon the judgment of the Honourable Supreme Court in Centre for Public Interest Litigation and another v. Union of India and others, (2000) 8 SCC 606, wherein the Supreme Court has held as under :-

> " ... ...
>
> Award of the contact was not vitiated by non-application of mind merely because of non-placement of materials of the comparative study before the Government. Moreover, whether the oil wells should be developed on a stand-alone basis by ONGC or

not, was a matter of policy with which the Court would not interfere solely on the ground that there was no reference to such study in the decision of the Government. Therefore, the allegation of non-application of mind cannot be accepted.

... ... "

In the aforesaid decision, dealing with a situation where two options were available before the Government of India to have a fixed royalty and cess or a varying rate based on an ad valorem rate of oil, and wherein after taking into consideration the entire value of the contract, the Government of India opted to go in for a fixed royalty rate, the Supreme Court, stating that there is no arbitrariness in such decision, held as under :-

" ... ...

It cannot be concluded that such a decision was arrived at either arbitrarily or unreasonably. It is not safe to come to the conclusion that freezing of royalty and cess during the period of contract was done in the instant case with the sole intention of granting undue benefits to the joint venturer.

... ... "

40. After considering the facts and circumstances of the case, we are of the opinion that an independent Committee has undertaken the task of selecting the best available person for the purpose of execution of the work in question. Looking to the nature of Project and the work to be executed, if respondent No.2 was of the opinion that Centrifugal Chillers with R-134a refrigerant should be given preference and ultimately, on physical inspection if the Committee has recommended the case of respondent No.3, it cannot be said that the said decision is in any way discriminatory or arbitrary. It is also not possible for us to accept the say of the appellant that it was decided from the beginning to allot the work in question to respondent No.3. As observed by us earlier, the appellant was already given an opportunity to point out similar type of work, which they have executed, and thereafter, on comparative assessment of the work carried out by the appellant and respondent No.3, ultimately, the decision was taken by the Committee to award the work to respondent No.3, who was found to be

technically qualified for the job in question. Since the claim of the appellant for getting the work in question was also examined objectively by the Committee on its own merits, it cannot be said that the decision arrived at by the Committee suffers from the vice of arbitrariness or favouritism. Considering all these facts and circumstances of the case, therefore, it is not possible for us to accept the say of the appellant that the decision making process was vitiated in any manner. The scope of interference by this Court is well-established and we do not think that the case of the appellant falls within that limited arena in which this Court can interfere.

41. It is also not possible for us to accept the say of the appellant that simply because it has not named the technical expert, the Committee should not have decided against the appellant. Respondent No.3 expressed confidence that they will be able to execute the job in question without involving any Consultant. As against this, the Committee was of the opinion that the appellant does not seem to have confidence on system design in absence of a Consultant. It also appears that for Centrifugal chillers with R-134a Refrigerant, respondent No.3 is having better experience, who, according to respondent No.2, can effectively execute the work in question and Respondent No.2 is entitled to select the best available person for executing the work in question.

42. On all the above grounds, especially when it is not possible for this court to substitute its own decision on merits for that of the Authority vested with the decision making process, we do not find that the learned single Judge has committed any error of facts or of law in rejecting the claim of the present appellant. We do not find any substance in this Appeal and the same is accordingly dismissed with no order as to costs.

In view of the dismissal of the LPA, no order need be passed in Civil Application No.34 of 2001. Interim order, if any, passed therein shall stand vacated.

7th February, 2001. (D.M. Dharmadhikari, C.J.)

(P.B. Majmudar, J.)

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(apj)